the party changed to a small sampan. The statement then proceeds —

"The Indonesian in charge of our party then asked me to guide the party to land at Pontian Besar. We landed in Pontian Besar at about 4.00 a.m. on 17/8/64.

We were all armed. I was given a sten gun, one hand grenade & 4 magazines with 25 rds. in each magazine. I was also given Malaysian currency $100. This was handed to me by the Indonesian who was shot dead. The other four Indonesians in our party were each armed with a machine gun & about one/two hand grenades each. I do not know how much ammunition they were carrying. None of us had any small arms.

I do not know any of their names. We brought along with us 2 days ration only. When we landed in Pontian, I was asked by the Indonesian (decd.) to lead the party to get some food and we decided to break into two gangs to look for food. After I had walked with the Indonesian (decd.) for about 1 hour towards the direction B/Pahat, and while walking along a kampong path, we saw about 10 military personnels about 150 yards. When they saw us we stood down. I was asked to open fire as he had done so. I refused to do so and this Indonesian then ran away from me and when I stood up to surrender my companion then shot me on my back. He was then shot down by the military."

In his evidence given at the trial, the appellant gave evidence that varied greatly from this statement. He said in effect that he was tricked into setting out with others on a business journey to Pulau Ketam, i.e. not to Indonesia at all, and when he enquired why the journey was taking so long, one of the party produced a revolver or pistol and told "me to follow what he said." The party then proceeded to Silat Panjang. Next morning, two of the party were missing and at 8 a.m. police came and arrested him. He was then detained in the police station for four or five days and, after that, confined to a room for a month, being allowed out only to take his bath. For five days before returning to Malaya, he was given exercise and taught to fire a sten gun. As for possession of the gun and ammunition, he states that, during the firing incident, he was on the ground outside the house. The Indonesian who was shot, threw the sten gun and a belt of ammunition to him from the house. He did not pick up the sten gun. He told a most improbable story about the Indonesian spending his time trying to force appellant to fight while firing by the police was actually going on. Finally, the Indonesian shot him.

This account, which was obviously an attempt to raise duress, was dismissed by the trial judge as lies, and he found that the appellant had come to this country carrying the sten gun and magazines, which was what the appellant had said in his statement. The rejection of the account given in evidence has not been challenged on appeal and a ground of appeal relating to duress was abandoned at the hearing. In any event, section 69 of the Internal Security Act, 1960, precludes duress as a defence to the charges of which the appellant was convicted.

With one exception, the remaining grounds of appeal related to questions of credibility, based on minor inconsistencies in the evidence, and to questions of inferences more favourable to the appellant, which might have been drawn. However, bearing in mind that the issue the judge had to determine was whether appellant had possession of the sten gun and the ammunition, with the evidence in the state already detailed in this judgment there was overwhelming evidence of possession, based principally on the evidence contained in the appellant's own statement plus the evidence of the assistant superintendent of police and supported by the evidence of the constable who saw a man jump out of the house apparently carrying a sten gun. There were no inconsistencies or possible inferences in the rest of the evidence that would justify a Court of Appeal in interfering with a finding of possession in the face of evidence so strong.

The remaining ground of appeal raises misdirection in respect of the issues of onus and quantum of proof required of the prosecution and the appellant respectively. There is nothing in the judgment to suggest that the judge did misdirect himself on these issues. The evidence was such that once the evidence of the police witnesses was accepted, corroborated as it was by the appellant's own statement, obviously no failure of a judge, trying these charges alone, to refer to these principles in reasons for judgment written after he had found the appellant guilty, can raise any suggestion of miscarriage of justice when the evidence of possession was overwhelming.

For these reasons, this appeal is dismissed and the convictions and sentences confirmed.

Appeal dismissed.

Solicitors: *Abdullah A. Rahman & Co.*

RE IJOT BINTI BELIKU

[O.C.J. (Lee Hun Hoe J.) August 26, 1965]

[Sibu — Civil Application No. 1 of 1965]

Certiorari — Application to quash decision of Probate Officer — Want of jurisdiction.

This was an application by the applicant for an order of *certiorari* to quash the decision of the probate officer ordering that the estate of Beliku bin Lameng, deceased, be equally divided between the applicant and Suhaili bin Haji Drahman. Letters of administration to the estate of the deceased had been granted to the applicant. There was a dispute between the applicant and Suhaili as to their rights in the deceased's estate and the probate officer purported to hold an inquiry into their rights as a result of which he ordered the estate to be equally divided between them.

Held: the probate officer had exceeded his jurisdiction in purporting to hold the inquiry and to order the division of the estate and therefore his order must be quashed.

Case referred to:—

(1) *Re Chiew Siew Khim* [1964] M.L.J. 414.

APPLICATION.

S. Sahathevan for the applicant.

Lee Hun Hoe J.: This is an application by Ijot binti Beliku for an order of *certiorari* to remove into this court for the purpose of being quashed the decision of the probate officer, Sibu dated the 25th August, 1962, ordering that the estate of Beliku bin Lameng (deceased) be equally divided between applicant and Suhaili bin Haji Drahman.

Beliku bin Lameng died intestate on 27th April, 1961 leaving, it was not disputed, applicant, an adopted daughter and a cousin, Suhaili bin Haji Drahman. He left certain real properties in Sibu, namely,

(a) a piece of land situate at Kreto, Sibu, containing 12.65 acres, more or less and comprised in Sibu Lease of Crown Land No. 56351; and

(b) A piece of land situate at Sebrang, Kampong Nangka, Sibu, containing 2.53 acres, more or less and comprised in Sibu Occupation Ticket No. 34730.

It seems that a dispute arose between applicant and Suhaili bin Haji Drahman as to their rights in deceased's estate. On 24th August, 1962 the probate officer, Sibu purported to conduct an inquiry into their rights and on 25th August, 1962 gave his decision and ordered that the two pieces of land be equally divided between the two.

Letters of administration were granted to applicant on 21st March, 1963. As administratrix she applied to be registered proprietor of the said two pieces of land. Her application was granted and registered at the Sibu land registry office on 4th June, 1964.

In Kuching in respect of Malay and Dayak estates the district officer is the probate officer but elsewhere in Sarawak the officer-in-charge of the district. See section 2 of the Administration of Estates Ordinance (Cap. 80) (1948 Revised Edition). In Sibu the district officer assumes the responsibility of probate officer. The various powers conferred on a probate officer are defined in the said Ordinance.

Section 3 of the said Ordinance defines the jurisdiction of the probate officer. Section 4 is concerned with dealings of the assets prior to official representation. Section 8 defines the persons entitled to letters of administration in order of priority. Section 9 gives the probate officer a discretionary power to issue the grant to any other person if the person or persons entitled to letters of administration is or are unfit to act.

Although in this case I am not concerned with the probate officer's jurisdiction under sections 8 and 9 I would like to make some comments. According to section 8 the person entitled to the grant of letters of administration in order of priority in this case should have been the deceased's nearest male relative, i.e. Suhaili bin Haji Drahman. Next in order of priority should have been the deceased's nearest female relative, i.e. applicant. No heiress is mentioned as being entitled to priority over the deceased's nearest male relative except deceased's widow, or primary widow if more than one. It would therefore appear that the probate officer had exercised his discretionary power under section 9 by granting the letters of administration to applicant. His decision in this respect has never been challenged. Section 32 empowers the probate officer to revoke his grant of letters of administration at any time upon good cause being shown.

By an affidavit filed on 5th July 1965 the probate officer affirmed that there is no provision in the said Ordinance that a tribunal should be constituted to deal with this matter and that he acted in his quasi judicial capacity and in accordance with section 61 of the "Muslim Law Ordinance." First I must point out that there is no such Ordinance known as the Muslim Law Ordinance in existence in Sarawak. It is possible that the probate officer had in mind the FASAL YANG KAENAM PULOH SATU of the *Undang-Undang Mahkamah Melayu Sarawak* made under section 3 of the Native Customary Laws Ordinance (Cap. 51). In the same way as the TUSUN TUNGGU was declared by orders to be the Native Customary Law for the Iban Communities in the Third, Fourth and Fifth Divisions of Sarawak, the *Undang-Undang Mahkamah Melayu Sarawak* was declared by the *Undang-Undang Mahkamah Melayu Sarawak* Order to be the native customary law for the Malay Community of Sarawak.

The basic principles concerning the order of *certiorari* were, with great respect, admirably set out in *Re Chiew Siew Khim* (1) by McGilligan J. at page 414 as follows:—

> "*Certiorari* lies at common law to remove (to the court) for the purpose of quashing such proceedings, the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions (*Halsbury* third edition, Volume II page 128). The grounds on which *certiorari* to quash will lie may be summarised as follows (from pages 142 *et seq* of the same Volume II):
>
> (i) Excess or want of jurisdiction;
>
> (ii) Bias by interest;
>
> (iii) Breach of the rules of natural justice;
>
> (iv) Fraud and perjury;
>
> (v) Proceedings improperly brought before the inferior court, tribunal or person exercising judicial functions;

(iv) An error in law apparent on the face of the record."

In this case the question of the probate officer exercising his discretion does not arise. It seems to me only grounds (i) and (v) would have to be considered. In my view the said Ordinance (and in particular section 4) does not clothe the probate officer with power to make such an order as the one he made on 25th August, 1962. The exercise of such power is tantamount to the making of a declaration of the rights of persons interested in the estate. The probate officer could exercise his discretion to administer the estate only if there is no person competent or willing to administer the same. Here letters of administration were granted to applicant in preference to Suhaili bin Haji Drahman whom he apparently considered unfit to act. There is provision under section 29 of the said Ordinance for executor or administrator to refer to court for settlement any question arising in the course of winding up the estate. The rules of the Supreme Court are also of considerable assistance on procedural aspects. In the circumstances I hold that the probate officer should not have made the order for want of jurisdiction.

The dispute was clearly improperly brought before the probate officer who should have declined to assume jurisdiction. It would be better if he concerns himself as to whom the letters of administration should be granted. Once that is done he may advise the person to whom the letters of administration has been granted of the provision under section 29 of the said Ordinance.

The probate officer had taken considerable trouble to seek expert advice on the matter before he made his decision. It may well be that his decision touching the rights of the parties is correct and in accordance with the native customary law relating to the Malay community in Sarawak.

However in my judgment I consider the order made by the probate officer dated 25th August, 1962 was *ultra vires*. That order will therefore be quashed. Accordingly the applicant is entitled to the order he seeks and costs to be paid out of the estate.

Application granted.

SIM KHOON SENG v. THIO ENG THENG

[O.C.J. (Choor Singh J.) August 28, 1965]

[Singapore — Suit No. 1566 of 1962]

Landlord and Tenant — Duty to repair — Abatement order made against premises — Whether landlord owes a duty to repair — Whether failure to do so constitutes breach of covenant for quiet enjoyment — Whether landlord liable for negligence or nuisance in the circumstances.

The plaintiff claimed a declaration that he was the tenant of the defendant in respect of a part of house No. 3 Evelyn Road, Singapore, a mandatory order, injunctions and damages for breach of covenant for quiet enjoyment, nuisance and negligence. The house was originally let by the defendant to one Sim Beng Tee, who in turn let out one of the rooms in the basement of the premises to the plaintiff. It was then agreed that the tenant should keep the premises in repair. After the death of Sim Beng Tee, his widow was accepted as a tenant by the defendant upon the same terms as applied to him. The widow subsequently agreed to give up vacant possession of the premises but the plaintiff refused to move out and continued to occupy the basement. The defendant however refused to accept the plaintiff as sub-tenant and to accept rent from him. The premises had fallen into considerable disrepair and an abatement order had been made in 1960 requiring the defendant to carry out certain repairs to the premises. This order had not been complied with by the defendant on the ground that the premises were not worth repairing and that it was not economical to carry out the repairs. The plaintiff alleged that as a result of the failure to carry out the repairs, the defendant had caused him annoyance, discomfort and damage.

Held: (1) when the widow of the original tenant gave up possession of the premises the plaintiff became a statutory tenant of the defendant in respect of the room in the basement;

(2) the neglect of the defendant to comply with the abatement order made under the Local Government Ordinance did not give the plaintiff whose property may have been injured by such neglect a right to have the abatement enforced and therefore the plaintiff was not entitled to a mandatory order to order the defendant carry out the repairs;

(3) as the contract in this case between the landlord and the tenant had provided that the tenant should keep the premises under proper repair, the defendant was under no obligation to repair the premises and therefore there had been no breach of the covenant for quiet enjoyment by his failure to repair and further the defendant could not therefore be liable for negligence to the plaintiff;

(4) the defendant as the landlord of the premises could only be liable for negligence and for injury to persons or property on the demised persons resulting from the non-repair of the premises if he was in actual occupation of the premises and as in this case the defendant was not in occupation or control of the premises, he was not liable for negligence in this respect;

(5) the plaintiff's claims for injunctions must be dismissed as there was no evidence that the defendant or anybody had prevented the plaintiff or members of his family from entering or occupying the premises or that the plaintiff was required to vacate the premises to enable repairs to be carried out.

Cases referred to:—

(1) *Robinson* v. *The Mayor and Corporation of the Burrough of Workington* [1897] 1 Q.B. 619.

(2) *Cavalier* v. *Pope* [1906] A.C. 428.

CIVIL SUIT.

K. K. Bezboruah for the plaintiff.

C. H. Smith (*Lim Seow Beng* with him) for the defendant.

Cur. Adv. Vult.

Choor Singh J.: In this suit, the plaintiff claims a declaration that he is the tenant of the defendant in respect of a part of house No. 3 Evelyn Road, Singapore, a mandatory order, two injunctions and damages for (1) breach of